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New Motor Vehicle Board

In-Site

NATIONAL ASSOCIATION OF MOTOR VEHICLE BOARDS AND COMMISSIONS FALL 2016 WORKSHOP

The National Association of Motor Vehicle Boards and Commissions (NAMVBC) held their annual workshop in Denver on September 14-17, 2016. Denver's most famous car dealer and former Bronco MVP Super Bowl quarterback, John Elway, kicked-off the workshop at Wednesday's welcoming reception at the offices of Wheeler Trigg O'Donnell LLP.

Thursday morning began with a greeting by NAMVBC's President and the New Motor Vehicle Board's Executive Director, Bill Brennan followed by the local Thornton Police Department's Presentation of the Colors. The first topic on the agenda was part one of a discussion regarding sales effectiveness, its application in decision-making and its benefits/pitfalls. Presentations were made by Russell McRory, Esq., partner at Arent Fox LLP and lead attorney for Beck Chevrolet in the New York Court of Appeals Decision in *Beck Chevrolet, Inc. v. General Motors LLC*, and James McGrath, Esq., partner at Seyfarth Shaw

LLP and lead attorney for General Motors. After a short break, part two of the discussion was held by a panel including Joseph Roesner, President of the Fontana Group, Inc., Sharif Farhat, Vice President of Expert Analytical Services at Urban Science and Jim Moors, Senior Counsel of the National Automobile Dealers Association.

After lunch, Glenn Mercer gave an informative presentation on the "dealership of tomorrow". His discussion included observations regarding the nature of change and a three-part change framework which includes connectivity, mobility and autonomy. He also discussed the possible implications for dealers and the pros and cons of each part of the change framework. Mr. Mercer also spoke about this topic at the most recent National Automobile Dealers Association ("NADA") convention in January 2017.

Afternoon discussions also included the topic of vehicle recalls and the overall implications

of "grounding" vehicles. This panel included Don Hall, President of the Virginia Automobile Dealers Association, Joe Gebhardt, Owner of Davidson-Gebhardt Chevrolet and President of the Colorado Motor Vehicle Dealer Board and Andy Koblenz, Executive Vice President of Legal and Regulatory Affairs and General Counsel for NADA.

Day one wrapped up with an interesting discussion on the current issues regarding illegal export of new vehicles. Monica Baumann, former Director of Legal and Regulatory Affairs for the California New Car Dealers Association and Sarah Bernstein, a partner at Barack Ferrazzano Kirschbaum & Nagelberg LLP, addressed these issues.

The second day began with a panel on Autonomous Vehicles, including a Point/Counterpoint presentation by Rutt Bridges, author of "Driverless Car Revolution: Buy Mobility, Not Metal" and Tim Jackson, (cont. on page 3)

JANUARY 18, 2017 MEETING OF THE BOARD

The New Motor Vehicle Board ("Board") met on January 18, 2017, at its offices in Sacramento. The meeting agenda contained administrative matters, as well as one protest involving a dealer/manufacturer dispute. In addition, the Board considered applications to hire two new administrative law judges to add to the current rotation.

The full agenda and materials can be found on the Board's website at www.nmvb.ca.gov.

2017 BOARD OFFICERS

At its January 18, 2017, General Meeting, the Board elected Ramon Alvarez C., Dealer Member, to serve as the Board's President. He was appointed by Governor Arnold Schwarzenegger in March 2007, and reappointed in November 2010. Governor Jerry Brown reappointed Mr. Alvarez on April 22, 2014. Mr. Alvarez C. previously served as Chair of the Government and Industry Affairs Committee and is now serving as a member of that committee.

Kathryn E. Doi, a Public Member, was elected to serve as the Board's Vice President. Governor Jerry Brown appointed Ms. Doi in September 2013. Ms. Doi was reappointed in March 2017. Ms. Doi has previously served as Chair of the Policy and Procedure Committee and a member of the Board Development Committee. She will now serve as a member on the Policy and Procedure Committee.

Ramon and Kathryn will also serve as the Board's Executive Committee.

NEW PROTEST MAILING LIST

If you would like to receive an e-mail with a PDF of each new protest filed with the Board, please contact Eugene Ohta at (916) 327-7261 or eohta@nmvb.ca.gov.

2017 COMMITTEE MEMBERS

ADMINISTRATION COMMITTEE

Bismarck Obando, Chair

Rahim Hassanally, Member

BOARD DEVELOPMENT COMMITTEE

David C. Lizárraga, Chair

Ryan Brooks, Member

EXECUTIVE COMMITTEE

Ramon Alvarez C., President

Kathryn Ellen Doi, Vice President

FISCAL COMMITTEE

Victoria Rusnak, Chair

Anthony A. Batarse, Jr., Member

GOVERNMENT AND INDUSTRY AFFAIRS

COMMITTEE

Glenn E. Stevens, Chair

Ramon Alvarez C., Member

POLICY AND PROCEDURE COMMITTEE

Rahim Hassanally, Chair

Kathryn Ellen Doi, Member

President of the Colorado Automobile Dealers Association. After a short break, a second panel on Autonomous Vehicles discussed their impact on other industries. Robert Redding, Jr., spoke on behalf of the Automotive Service Association, Donald Light, Director of North America Property Casualty Practice, Celent, spoke regarding the insurance industry.

The afternoon held two more topics: current issues affecting regulators, presented by Bruce Gould, Retired Executive Director of the Virginia Motor Vehicle Dealer Board and “Stuck in the Middle with You: Factories to the Left of Me, Dealers to the Right, Here I Am” moderator Greg Kirkpatrick, Executive Director of the Arkansas Motor Vehicle Commission.

Copies of slide show presentations can be found on the NAMVBC’s website at namvbc.org under “past presentations”.



RECENT COURT DECISION

The U.S. Court of Appeals for the Second Circuit recently ruled on the case of *Beck Chevrolet Co., Inc. v. General Motors LLC*.

For the second time, this case came before the U.S. Court of Appeals for the Second Circuit. Plaintiff/Appellant Beck Chevrolet appealed two judgments in favor of Defendant, General Motors, from U.S. District Court for the Southern District of New York. The U.S. District Court found for Defendant, GM, on several claims seeking relief under New York’s Franchised Motor Vehicle Dealer Act. The Second District Court of Appeals certified two questions to the NY Court of Appeals:

1) “Is a performance standard that uses “average” performance based on statewide sales data in order to determine an automobile dealer’s compliance with a franchise agreement “unreasonable, arbitrary or unfair” under New York Vehicle and Traffic Law section 463(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle types?”

The Court of Appeals answered in the affirmative. It then instructed, “[t]o comply with the Dealer Act, if a franchisor intends to measure a dealer’s performance based on a comparison to statewide data for other dealers, then the comparison data must take into account the market-based challenges that affect dealer success.” It then concluded GM’s RSI unlawful.

In light of this ruling, the Second Circuit Court of Appeals reversed the District Court’s judgment in favor of GM and remanded it with a direction to enter judgment in favor of the dealer and to order injunctive relief consistent with the NY Court of Appeal’s answer to the first question above.


The second question certified to the NY Court of Appeals was in regard to modifications of a franchise. Specifically, the Dealer Act permits a franchisee, upon receiving notice of an intended modification, to challenge it as unfair and shift the burden to the franchisor to prove that it is fair and not prohibited. A modification is unfair if it is not undertaken in good faith; is not undertaken for good cause; or would adversely and substantially alter the rights, obligations, investment or return on investment of the franchised motor vehicle dealer under an existing franchise agreement. Therefore, the second question posed was:

2) “Does a change to a franchisee’s Area of Primary Responsibility or AGSSA constitute a prohibited modification to the franchise under Section 463(2)(ff), even though the standard terms of the Dealer Agreement reserve the franchisor’s right to alter the Area of Primary Responsibility or AGSSA in its sole discretion?”

The Court of Appeals found that a change in AGSSA constituted a modification to the franchise under the Dealer Act because it has potential to significantly impact the franchise agreement. However, the Court stated that each change to AGSSA must be addressed on a case-by-case basis and that such revisions weren’t *per se* violations of the Dealer Act.

In light of this ruling, the Second Circuit Court of Appeals also vacated the district court’s judgment and remanded for it to resolve the issue consistent with the legal principals set forth in the New York Court of Appeal’s answer to the second question.

The Court’s full decision can be read at: <http://cases.justia.com/federal/appellate-courts/ca2/13-4066/13-4066-2016-12-29.pdf?ts=1483023605>



CONSUMER MEDIATION SERVICES

Most people are not aware that in addition to the New Motor Vehicle Board's program for dispute resolution for dealers, manufacturers, and distributors, the Board also offers an informal, no-cost, dispute resolution program for consumers who have a complaint against a new vehicle dealership or manufacturer. The mediation program has been in existence since 1968. On average, the program is able to reach an amicable resolution in approximately 67% of its cases. The Board's mediation program receives over 700 phone calls annually and in FY 15/16 received 498 mediation cases.

The Board's staff act as neutral facilitators between the disputing parties. Participation in this process is totally voluntary by all parties involved. In addition, the Board staff do not have the authority to order a dealer or manufacturer to provide a specific remedy.

Information on the mediation services program can be found on the Board's website and consumers can fill out and submit a request for mediation electronically. Typical types of complaints filed with the program include contractual disputes; warranty/repair disputes; used vehicles sold by a new/used dealership and used vehicles with remaining original warranties.

Some types of complaints that do not fall within the Board's jurisdiction are private party sales or transactions; used vehicles with no remaining original warranty; vehicles sold "As-Is"; odometer fraud; Lemon Law. These types of complaints are referred to the agency with the proper jurisdiction.

The Board does not have authority to enforce the Tanner Consumer Protection Act (commonly called the Lemon Law) but does provide information on this law and refers consumers to the Department of Consumer Affairs, Arbitration Certification Program for more information.

The mediation program provides a vital service to California consumers as well as the motor vehicle industry as a whole. If you would like more information on this service, please visit our website at www.nmvb.ca.gov and click on the Consumer Program tab.

UPCOMING NEW MOTOR VEHICLE BOARD 14TH INDUSTRY ROUNDTABLE

Please note that the New Motor Vehicle Board has cancelled its Industry Roundtable for 2017. We look forward to reinstating the Roundtable in 2018.

UPCOMING BOARD MEETINGS

⇒ May 18, 2017, Special Meeting, Sacramento, California

⇒ June 2017, General Meeting, Riverside, California: date TBD

⇒ September 19, 2017, General Meeting, Sacramento, California

CASE MANAGEMENT UPDATES

Protests:

So far this year there have been 30 protests filed with the Board as follows:

- 3 termination protests (Veh. Code § 3060(a));
- 1 relocation protest (Veh. Code § 3062(a)(1));
- 26 modification protests (Veh. Code § 3060(b));

Board Notices:

The following table summarizes the number of notices filed this year:

Manufacturer	Type of Notice	# Filed	Product
Acura	3062 relocation	2	Cars
American Honda	3060 termination	1	Cars
American Honda	3062 relocation	5	Cars
FCA (Alfa Romeo)	3060 modification	21	Cars
FCA (Alfa Romeo)	3062 establishment	1	Cars
FCA (Chrysler, Jeep, Dodge, RAM)	3062 relocation	12	Cars
FCA (Fiat)	3062 establishment	1	Cars
FCA (Fiat)	3060 modification	36	Cars
Ford (Lincoln)	3060 termination	1	Cars
Forest River	3060 termination	1	Recreational Vehicles
Polaris (Victory)	3060 termination	22	Motorcycles
Yamaha	3062 relocation	1	Motorcycles
TOTAL		104	

Merits Hearings:

A 15-day merits hearing was held in *Dependable Dodge, Inc., v. Fiat Chrysler Automobiles, Inc.* (Protest Nos. PR-2454-15 and PR-2436-15) before Administrative Law Judge Kymberly Pipkin at the offices of the New Motor Vehicle Board on August 15-19, 2016, August 29-September 2, 2016, September 6-9, 2016, and telephonically on September 28, 2016. The Board adopted Judge Pipkin's Proposed Decision as its final Decision at its March 15, 2017, General Meeting.

There are currently eight additional hearings tentatively scheduled throughout 2017. The hearings are held at the Board's offices in Sacramento and are open to the public.

AMENDMENTS TO THE VEHICLE CODE PURSUANT TO RECENTLY EN- ACTED LEGISLATION AB 287

On September 27, 2016, Assembly 287 was signed by Governor Brown and chaptered. It became effective on January 1, 2017.

This bill enacted the Consumer Automotive Recall Safety Act ("CARS Act"). It prohibits a dealer or rental car company, as defined, with a motor vehicle fleet of 34 or fewer loaner or rental vehicles from loaning, renting or offering for loan or rent a vehicle subject to a manufacturer's recall after receiving a notice of the recall, as specified, until the vehicle has been repaired, except as specified. The act also requires the Department of Motor Vehicles ("DMV") to include a specified recall disclosure statement with each vehicle registration renewal notice. The bill specifies that the warranty obligations stated in Vehicle Code § 3065 include all costs associated with the disposal of hazardous materials that are associated with a recall repair. The bill also provides, for purposes of the above-described warranty obligations, that a warranty includes a recall conducted pursuant to federal motor vehicle safety laws. The bill authorizes DMV to suspend or revoke a license issued to a dealer, transporter, manufacturer, manufacturer branch, remanufacturer, distributor, or distributor branch upon determining that the person to whom the license was issued has, among other things, violated provisions relating to issuance of licenses and certificates to manufacturers, transporters, and dealers. The bill also authorizes DMV to suspend or revoke a license issued to the above-mentioned persons upon determining that the person has violated any provision of the CARS Act.

Due to the enactment of AB 287, amendments have been made to Vehicle Code §§ 3065, 11705, 11750, 11752, 11754, 11758, 11760, 11761, 11762. The amendments to Vehicle Code § 3065 are most pertinent to the Board and those who practice before it. It requires the franchisor to adequately and fairly compensate each of its franchisees for labor and parts used to provide warranty diagnostics, repair, servicing, and all other conditions of the obligation, including costs directly associated with the disposal of hazardous materials that are associated with a recall repair. Subdivision (g) was added to reiterate that "warranty" includes a recall conducted pursuant to Sections 30118 and 30120, inclusive, of Title 49 of the United States Code.

In-Site

PRESIDENT'S PERSPECTIVE

It is an honor to serve on this Board as its President, and I appreciate my fellow Board Members for electing me. 2017 will be an exciting and productive year for the Board. The Board has already held two General Meetings. Usually, around this time of year the New Motor Vehicle Board sponsors its annual Industry Roundtable. Unfortunately, this year's event has been cancelled, but we look forward to its return next year.

The New Motor Vehicle Board also acknowledges the changing atmosphere of the automotive industry and specifically the amazing technology that is being developed in the automotive sector. The Board looks forward to being more inclusive and proactive in embracing this modern technology as it becomes more and more prevalent throughout the industry.

Additionally, the Board always strives to be a transparent and supportive organization in assisting both manufacturers and dealers to work together in improving the automotive landscape.

On behalf of the Board, I look forward to a successful term as your President.

New Motor Vehicle Board

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